

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICIA GRIFFITH
Claimant

VS.

WOLF CREEK NUCLEAR OPERATING CORP.
Respondent
Self-Insured

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Docket No. 1,012,810

ORDER

Respondent appeals the December 19, 2003 preliminary hearing Order of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits after the Administrative Law Judge determined that claimant had proven that she suffered accidental injury arising out of and in the course of her employment. Additionally, the Administrative Law Judge determined that claimant proved that she provided timely notice and timely written claim.

ISSUES

The specific issues raised by respondent are as follows:

- “1. Whether the Administrative Law Judge exceeded his jurisdiction; and
- “2. Whether the Administrative Law Judge improperly ruled medical treatment to be paid by respondent and insurance carrier on claimant’s behalf with Dr. Bene and otherwise improperly ruled.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed. It is noted the appeal by respondent is vague regarding what, if any, issues are being appealed. The bare allegation that the Administrative Law Judge exceeded his jurisdiction while complying with K.S.A. 44-551 is not specific enough to allow the Board to determine exactly what respondent is disputing. Additionally, the objection to the

medical treatment ordered is not an issue over which the Board takes jurisdiction in an appeal from a preliminary hearing.¹

However, a review of the preliminary hearing Order and the preliminary hearing transcript displays the real issues in dispute. Respondent argued claimant failed to prove that she suffered accidental injury arising out of and in the course of her employment while working at the Wolf Creek facility. Claimant contends her lengthy employment with respondent, operating typewriters and keyboards, 8 hours a day, five days a week, and occasionally during outage 10 hours a day, six days a week, was sufficient to cause her upper extremity problems.

Claimant initially developed problems in 1992, when she noticed pain in her left wrist, which was diagnosed as a ganglion cyst. Claimant underwent surgery twice for the removal of the cyst. Claimant presented bills to respondent for the treatment of the cyst. However, payment of those bills was denied by respondent as being non-work related, even though on August 3, 1992, respondent filed an employer's report of accident with the Kansas Division of Workers Compensation. Nevertheless, claimant's treatment was provided through her health insurance carrier. Claimant did discuss the cyst with her supervisors on more than one occasion.

Claimant's problems in her wrist returned and she developed additional problems while working over the next several years. In 1995, claimant again sought medical treatment, this time with Michael L. Kennedy, M.D., for upper extremity difficulties. Respondent again denied the condition as being non-work related. A June 28, 1995 medical report from Richard J. Bene, M.D., discusses claimant's upper extremity conditions, including the aggravation to the left wrist. At the time claimant underwent the initial surgeries in 1993 and 1994, a mesh material was placed on the volar wrist in order to prohibit or retard the return of the cyst. At the time of the 1995 examination, this plastic mesh material was causing claimant discomfort. Claimant was also having significant radial nerve neuritis. Dr. Bene opined at that time that an exploration of the wrist with removal of the mesh material would be appropriate. He also indicated a recurrent ganglion may be present.

This information was provided to respondent. On July 11, 1995, a telecopy transmittal was provided to Dr. Kennedy, another one of claimant's treating physicians, advising that claimant's upper extremity complaints were not covered under workers' compensation. This note was signed by Bob Compton, one of claimant's supervisors. Claimant then provided a handwritten note to respondent dated September 19, 1995, which was stamped received by HR employment (which the Board assumes was human resources employment with respondent) on September 19, 1995. This note stated that the

¹ K.S.A. 2002 Supp. 44-551; K.S.A. 44-534a.

bill associated with her upper extremity treatment with Plastic and Reconstructive Surgery Associates in Leawood, Kansas, “was suppose [sic] to go directly to Wolf Creek as it pertains to workers’ comp.” That September 19, 1995 note was written to an individual named Dave. The Board assumes David O. Reynolds, Human Resources Specialist III, was the Dave to whom the note was provided, as Mr. Reynolds provided a response on September 21, 1995, to claimant, indicating that the situation was determined by respondent to be non-work related and that Dr. Kennedy had been notified of this decision. Claimant was again advised to submit any charges related to the services to her health insurance carrier.

Claimant continued working for respondent through September 23, 2002, at which time her employment with respondent was terminated. The reason for the termination is not contained in the record. Her condition continued to worsen. Claimant continued treatment with Dr. Kennedy at the Coffey County Medical Center and, on August 24, 1997, Dr. Kennedy wrote a “To Whom It May Concern” letter regarding claimant. In this letter, Dr. Kennedy discussed claimant’s ongoing symptoms, including overuse syndrome and tendinitis of both the elbow and wrist. Dr. Kennedy discussed the fact that claimant’s activities, including typing, writing and keyboarding, would tend to aggravate her ongoing conditions. He also made specific recommendations for treatment. Claimant delivered this letter to Steven Hoch, the physician’s assistant for respondent.

Claimant continued experiencing problems. She testified that she talked to numerous respondent representatives over a period of years about her difficulties. These representatives included Steve Hopkins (her supervisor), Gene Lofton (the manager) and Brent Dale (who was her supervisor on her last day worked).

By April 3, 2001, claimant was being treated by Shari Quick, M.D., at the Midwest Rehabilitation Associates, for her upper extremity complaints. Claimant was diagnosed with bilateral carpal tunnel syndrome versus radiculitis, myofascial pain syndrome secondary to the carpal tunnel syndrome and bilateral lateral epicondylitis. There was also some concern that claimant may have a pinched nerve in her neck, which could be creating the carpal tunnel symptoms. EMGs and MRIs were recommended.

Claimant filed her E-1 with the Division of Workers Compensation on September 17, 2003, alleging a series of microtraumas beginning in 1992, and continuing through her last day worked of September 23, 2002. The E-1 claimed repetitive use to the wrists and upper extremities.

In workers’ compensation litigation, it is claimant’s burden to prove her entitlement to benefits by a preponderance of the credible evidence.²

² K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.³

In this instance, the only testimony presented is that of claimant. She discussed on numerous occasions the difficulties she encountered while working for respondent, the various respondent management level employees that she discussed the problems with and the fact that she, on numerous occasions, requested medical treatment. She was time and again advised that it was not a work-related condition, even in light of medical evidence which clearly stated that claimant's typing, writing and keyboarding activities were aggravating her condition. For unknown reasons, respondent time and again refused to provide medical care to claimant throughout her employment. Based upon the evidence presented, the Board finds that claimant has proven that she suffered accidental injury arising out of and in the course of her employment.

K.S.A. 44-520 requires that notice be provided to respondent within ten days of the date of accident. Here again, the record contains several statements by claimant during her testimony that she discussed her ongoing problems on numerous occasions with her supervisors. Claimant's efforts were frustrated as time and again her requests for medical care were denied and claimant was referred to her private health care provider. The notice requirements of K.S.A. 44-520 specify that the notice should state "the time and place and particulars thereof, and the name and address of the person injured. . . ." The Board again returns to the preliminary hearing testimony of claimant, wherein she discussed these ongoing problems on numerous occasions with numerous supervisors and was thwarted. The Board finds notice was provided in a timely fashion.

Finally, the Board considers the requirements of K.S.A. 44-520a, which require that written claim be submitted to respondent within 200 days of the date of accident or, where compensation has been suspended, within 200 days after the last date of the payment of compensation. The handwritten note by claimant on September 19, 1995, to Mr. Reynolds, specifies that the attached medical bill from Plastic and Reconstructive Surgery Associates was to be directed to workers' compensation. This, in and of itself, would satisfy the requirements of K.S.A. 44-520a, as claimant's allegations of injury are an ongoing series through her last day worked.

Additionally, K.S.A. 2003 Supp. 44-557 requires that an employer file a report of accident with the Director of Workers Compensation within 28 days after receiving knowledge of an alleged injury. Here again, claimant time and again advised respondent

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

of her ongoing difficulties. The only accident report ever filed by respondent was in 1992, associated with the cyst on claimant's left wrist. There was no indication in the record that any accident report was ever filed regarding claimant's additional and numerous upper extremity complaints, even after respondent was provided the medical records of Dr. Kennedy in 1997, indicating that claimant's typing, writing and keyboarding activities were aggravating her ongoing conditions. Under K.S.A. 2003 Supp. 44-557, failure to file an accident report as required extends the written claim time to one year from the date of accident. In this instance, claimant's termination was September 23, 2002. Her E-1 was filed with the Division of Workers Compensation on September 17, 2003, within one year of claimant's last day worked and, therefore, her date of accident.⁴ The Board, therefore, finds pursuant to K.S.A. 44-520a and K.S.A. 2003 Supp. 44-557, that claimant's written claim was timely filed in this instance.

The Board finds based upon the evidence in the record, that claimant has proven that she suffered accidental injury arising out of and in the course of her employment and that she provided timely notice and timely written claim regarding those accidental injuries. The Board, therefore, affirms the Order of the Administrative Law Judge.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated December 19, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2004.

BOARD MEMBER

c: Frank Taff, Attorney for Claimant
Evelyn Z. Wilson, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).